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No. 93-670

In The
Supreme Court of the United States
October Term, 1993

ALBERT HOWLETT,

Petitioner,

vs.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

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1. Holding a shipowner responsible for dangerous conditions in a cargo stow of which the shipowner knows, or would have reason to know by a reasonable inspection, would neither be the imposing of liability on a theory of "non-delegable duty," nor would it require the shipowner to "supervise" the work of the loading stevedore.

When Congress amended Section 5(b) of the Longshore and Harbor Workers' Compensation Act to eliminate the longshoreman's right to sue on the theory of unseaworthiness, it also stated that vessel liability no longer was to be

predicated on theories of "non-delegable duty."[1] Taking this as its cue, respondent repeatedly asserts in its brief that the "duty petitioner seeks to impose. . . is a non-delegable duty to provide a safe place to work . . ." (Respondent's Brief, page 34). This assertion is patently incorrect. In no way is the duty which petitioner is urging a form of "non-delegable duty." Rather, it is a duty of care which holds a shipowner liable, not for the negligence of others, but for the shipowner's *own* negligence in failing to remedy a dangerous condition of which the shipowner knows or, in the exercise of reasonable care, should have discovered. Not only is this not a form of "non-delegable duty," it is exactly the same duty of care which this Court previously adopted in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

In *Scindia* this Court held that the shipowner had a duty to exercise "ordinary care under the circumstances to have the ship and its equipment is such condition" that the stevedore would be able to conduct its cargo operations "with reasonable safety," see *Scindia*, 451 U.S. at 166-167. Therefore, as to conditions existing at the start of cargo operations, the vessel had a duty of "reasonable" inspection, and was "chargeable with knowledge" of those conditions which a "reasonable" inspection would be expected to disclose, *see Scindia*, 451 U.S. at 178.

When this Court, in *Scindia*, held that the vessel was "chargeable with knowledge" of dangerous conditions existing at the start of cargo operations, it clearly was speaking in the context of negligence law, *i.e.*, -- the shipowner had a duty to use "reasonable care" to discover dangerous conditions

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[1]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4703, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 21a.

existing at the start of cargo operations, and is "chargeable with knowledge" of those conditions which a "reasonable" inspection would have disclosed. Therefore, although not specifically mentioned in the *Scindia* opinion, a shipowner would not be "chargeable with knowledge" of conditions which were either latent or would not have been disclosed by a reasonable inspection, as holding a shipowner liable for such conditions would be tantamount to holding a shipowner liable for unseaworthiness.

Similarly, in the instant case petitioner does not contend that a shipowner should be held liable for dangerous conditions in a cargo stow which are either latent or would not have been disclosed by a reasonable inspection, and to the extent that respondent, in its brief, suggests that the duty which petitioner is urging is something more than the *Scindia* duty of "reasonable" inspection, respondent is misstating petitioner's position.[2]

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[2]Two of the decisions on which respondent places its greatest reliance, the pre-*Scindia* decisions in *Teofilovich v. d'Amico Mediterranean/Pacific Line*, 415 F. Supp. 732 (C.D. Cal. 1976), and *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2nd Cir. 1977), are examples of factual situations in which, at least on the basis of the evidence set forth in the opinions, the alleged dangerous condition in the cargo stow was such that it was not capable of being discovered by a "reasonable" inspection. In *Ruffino*, the condition was "concededly latent," *see* 559 F.2d at 863, and in *Teofilovich*, counsel for the longshoreman made no effort to establish that the alleged dangerous condition was capable of being discovered by a reasonable inspection. On their facts, therefore, neither *Ruffino* nor *Teofilovich* are in conflict with the principle that a shipowner has a duty to make "reasonable," but not "continuous," inspections of cargo loading operations, and the statements in the *Ruffino* and *Teofilovich* decisions that the shipowner does not have a duty to inspect or supervise the "minute details" of a cargo stow are but an alternative way of expressing this principle. Contrary to the decision in *Derr v. Kawasaki Kisen K.K.*, 835

(continued...)

Under *Scindia*, the vessel's liability is predicated, not on who may have created a dangerous condition, or on how or when that dangerous condition may have come into existence, but, rather, on the shipowner's "knowledge" that a dangerous condition exists. Where a longshoreman suffers injury by reason of a dangerous condition of which the shipowner knows, or in the exercise of reasonable care should have discovered, the vessel is held liable, not because it is responsible for the acts of those who may have created the condition, but, rather, because it is responsible for its *own* negligence in failing to remedy or warn of that condition, *see Scindia*, 451 U.S. at 167-168.

Respondent's assertion that the duty which petitioner seeks to impose is a form of "non-delegable" duty is based on the argument that it would result in the vessel being held responsible for the acts of an independent contractor, *i.e.*, the acts of the loading stevedore. The flaw in this argument is that, under the *Scindia* duty, there are a variety of situations in which a vessel may be held liable for a dangerous condition which originated in the negligent act of an independent contractor, and that, under the *Scindia* duty, the origin of the condition -- whether created by an independent contractor or otherwise -- is simply irrelevant once it is determined that the vessel knew or had reason to know of the existence of the condition.

By way of example, much of the repair and maintenance work on ships is done by independent contractors. For

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[2](...continued)
F.2d 490 (3rd Cir. 1987), neither *Ruffino* nor *Teofilovich* held that the shipowner had *no* duty of inspection with respect to the condition of a cargo stow, and *Ruffino* specifically recognized that shipowner could be held liable for conditions of which it had "constructive" as well as "actual" knowledge, *see* 559 F.2d at 862.

instance, if a steel railing on a ship were to break, or a metal cat walk were to be damaged, repair of these conditions would require the services of a welder. Ships do not normally have welders as crew members, and where welding is needed, an independent contractor normally is hired to make the repairs. If the welder does not do his work properly, and the broken railing or cat walk is not properly fixed, and, as a result, a longshoreman is subsequently injured, the vessel can not escape liability for the defective condition of the rail or cat walk by asserting that it was relying on the welder to do the repairs properly. Rather, under *Scindia*, the shipowner still would have its *own* duty of inspection, and would be liable for its *own* negligence in failing to remedy or warn of the condition.[3]

In this same vein, the cargo gear on today's ships usually are electrically or hydraulically powered winches or cranes. While some repair and maintenance work on such winches or cranes may be within the competence of the ship's crew, the repair of more serious break downs may require the services of specially trained mechanics, normally provided by independent contractors. Here again, if such repair work is not done properly and, as a result, a longshoreman is subsequently injured, the shipowner can not escape liability to the injured longshoreman on the grounds the defective

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[3]Compare *Hendrick v. Daiko Shoji Co., Ltd., Osaka*, 715 F.2d 1355 (9th Cir. 1983), in which a shipowner was held liable for injuries resulting from a defective splice in a wire cable. The shipowner had not done the splicing; rather, it had purchased the cable from the manufacturer already spliced. Even though the shipowner did not do the splicing, it was nonetheless held responsible for inspecting the splice before turning the cable over to the stevedore. The Court stated, 715 F.2d at 1357:

> "Where the shipowner itself supplies equipment, it has a duty to inspect the equipment before turning it over for use by the stevedore. *Scindia, supra.*"

condition of the winch or crane was caused by the negligence of the mechanic who was hired to make the repairs. Rather, under *Scindia*, the shipowner remains liable for its own negligence in failing to discover and remedy or warn of the defective condition.

Throughout the brief submitted by respondent, and even more so in the *amicus* brief submitted by the American Institute of Merchant Shipping ("AIMS"), the assertion is made that the duty which petitioner is urging would require the shipowner not only to "inspect," but to "supervise" the work of the loading stevedore. This use of the word "supervise" to characterize the shipowner's duty, to whatever extent it connotes something more than a reasonable "inspection" of the cargo loading operation, is the creation of counsel for respondent and counsel for the *amicus*, and does not accurately reflect petitioner's position. Rather, as is clearly and succinctly stated in Petitioner's Brief, at page 27, the shipowner's duty is to make "reasonable," not "continuous," inspections of cargo loading operations.

As is set forth in Petitioner's Brief, at pages 26-27, and, significantly, is neither denied, nor even commented on, in the briefs of respondent or *amicus* AIMS, it already is the custom and practice in the maritime industry for the crews of ships to observe cargo loading and unloading operations while they are in progress. Whether one characterizes such observations as being "inspections" or "supervision," the fact of the matter is that they are made. The duty which petitioner is urging would require shipowners to do no more than that which they are already doing, and the effort to pin the label of "supervision" on this should not be allowed to obscure the reality of what actually is being done. In point of fact, the duty which petitioner is urging is not one of "supervision" as that term is

commonly understood, but rather is a duty of reasonable "inspection," -- the same duty which this Court adopted in *Scindia*.[4]

2. The Ninth Circuit's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), correctly applied the principles set forth in this Court's decision in *Scindia*.

Both respondent and *amicus* AIMS devote a considerable portion of their briefs to attacking the Ninth Circuit's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), on a variety of grounds. These attacks are without merit, as a review of the *Turner* decision discloses that it correctly applied the principles set forth in this Court's decision in *Scindia*. We will respond to these attacks on the *Turner* decision in the order that they are raised in Respondent's Brief.

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[4]There is ample evidence that the practice of having the crew observe cargo operations, both in the loading and unloading ports, was followed by the crew of respondent's vessel in the instant case (J.A. 22-25). Respondent, in its brief, at page 3, attempts to explain this away by asserting that the crew members were observing the cargo loading operations only for purposes of "protecting the ship" and not for purposes of inspecting or supervising the details of the stevedore's cargo loading operations. However, this assertion was contradicted by the testimony of the ship's Captain that, if plastic had been placed under the stow of cocoa beans, the crew members who were on deck observing the cargo loading operation would have seen it and reported it to him, and that he then would have directed that it be removed (J.A. 23-24), thereby clearly establishing that, at least to this extent, one of the purposes of having the crew members observe the cargo loading operation actually was to supervise what the stevedore was doing.

a. The Turner decision does not "encroach" on the legislative intent that shipowners be held liable only for their own negligence.

Respondent initially attacks *Turner* on the grounds that it is in conflict with the 1972 Act's legislative history in that it imposes a duty on the shipowner to supervise the work of the loading stevedore and would hold the shipowner liable for the negligence of the loading stevedore. While we have already addressed similar arguments in Section 1 of this Reply Brief, a review of the *Turner* decision discloses that respondent and *amicus AIMS* have simply misread the decision.

Turner was tried as a jury trial before a Magistrate Judge. At the conclusion of the evidence, the Magistrate instructed the jury, consistent with the principles set forth in *Scindia*, and the duty being urged here, that the vessel ". . . would be liable to plaintiff if the master of the vessel knew or in the exercise of reasonable care should have known of the defective stow and the danger it posed," see *Turner*, 651 F.2d at 1302. The jury returned a verdict for the plaintiff which the Magistrate set aside. On appeal, the Ninth Circuit reversed and reinstated the verdict for the plaintiff. In so doing, the Ninth Circuit did not hold that the shipowner had a duty to "supervise" the operations of the loading stevedore, or that the shipowner was liable for the negligence of the loading stevedore. Rather, it held only that the evidence was sufficient to sustain the jury's finding that the ship's master "knew or in the exercise of reasonable care should have known" of the defective stow and the danger it posed, see *Turner*, 651 F.2d at 1305. This was a factual issue, limited to the evidence in the case, and at no point did the Ninth Circuit promulgate as a general principle of law that the ship would be liable for the negligence of a loading stevedore or

had general duty to supervise the operations of the loading stevedore.

What the Ninth Circuit did hold in *Turner* was that the 1972 Act did not bar a shipowner from suing a loading stevedore who was not the employer of an injured unloading longshoreman, and that, in these circumstances, it was not the intention of Congress to leave the injured unloading longshoreman without a damage remedy against the vessel, as the vessel would be in a better position than the injured longshoreman or his stevedore employer to take action to prevent the creation of dangerous conditions in a cargo stow, *see Turner*, 651 F.2d at 1304. Given the clear statutory language which only bars the shipowner from suing the longshoreman's employer, and not other stevedores, coupled with the expressed intention of Congress that the Act be interpreted in a manner which would encourage vessel safety, the *Turner* decision hardly can be considered a "judicial encroachment" on the role of the legislature.[5]

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[5]Respondent also argues that, since Congress did not mention imposing liability on vessel owners for the negligent acts of a foreign loading stevedores in the Acts's legislative history, the courts should not do so, *see* Respondent's Brief, at page 18. This argument fails for several reasons. First, as noted at several points in this brief, under the *Scindia* duty, and the duty being urged here, liability is not imposed on the vessel for the negligence of the loading stevedore. Rather, liability is being imposed on the vessel for its own negligence in failing to remedy a dangerous condition of which it knows or, in the exercise of reasonable care, has reason to know. Second, the legislative history is not silent on the point; instead, consistent with the provisions of land-based law, the legislative history speaks in terms of the existence of a dangerous "condition," not who created the condition. Thus, the legislative history states:

> "Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous *condition*."

(continued...)

b. Turner's factual assumptions are valid.

(i) Ability to sue.

In Turner, the Ninth Circuit noted that the 1972 Act, while barring the ship from suing an injured longshoreman's stevedore employer, did not bar the ship from suing a foreign loading stevedore, and in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442, 1446 (9th Cir. 1993), the Ninth Circuit noted that the possibility of such a suit would furnish an incentive for the foreign stevedore to do its work carefully. In an effort to undermine the *Turner* and *Riggs* decisions, respondent argues, without any supporting authority, that the right to bring such a suit may not always be available to a shipowner (1) because the vessel may not have regular contact with the port where

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[5](...continued)

(House Report No. 92-1441, 1972 U.S. Code Cong. and Adm. News 4698, at 4704)(Emphasis supplied)

Respondent also argues that the position petitioner is urging is inconsistent with the legislative history because it would apply to dangerous conditions created by American loading stevedores who are "stevedores subject to the Act" and, therefore would not be subject to suit by the vessel, *see* Respondent's Brief, page 19, f.n. 13. However, the reference in the legislative history to "stevedores subject to the Act" should be read in the context in which it is used as referring to the longshoreman's "employer" stevedore. While the term "employer" as defined in Section 2(4) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C § 902(4), can be broadly interpreted as referring to all American stevedores, whether or not they are the employer of a particular injured longshoreman, this broad interpretation has been rejected, and the term "employer," has been interpreted as referring only to the stevedore who was the actual employer of the injured longshoreman, *see Cooper Stevedoring Co. v. Kopke*, 417 U.S. 106 (1974). Therefore, for purposes of the duty at issue here, an American loading stevedore who is not the employer of the injured longshoreman would not be a stevedore "subject to the Act" and would be subject to suit by the vessel just the same as a foreign loading stevedore, *Ibid.*

the loading stevedore is located, or (2) the loading stevedore may be a government entity immune from suit under the doctrine of sovereign immunity. Relying on these unsupported assertions, respondent criticizes the *Turner* Court for assuming that both the right and the ability to sue the loading stevedore would be available to the vessel. However, the *Turner* Court can hardly be faulted for this because, if its assumptions were in any way in error, it was the responsibility of counsel for the shipowner to so inform the Court, something which counsel for the defendants in *Turner* apparently (and probably wisely) chose not to do because the defendant ship charterer in *Turner* was Japan Lines, Ltd. and the loading stevedore was a Japanese stevedore, located in Japan, *see* 651 F.2d at 1301, a country where government ownership of commercial businesses is not common.

Moreover, even if it were true that, in some individual cases, a shipowner might find it difficult to sue a loading stevedore, this would not undermine the reasoning of *Turner* or *Riggs*, for, as between a shipowner and an injured longshoreman, whether or not the shipowner may be able to bring suit against the loading stevedore would not change the fact that the shipowner's liability is based on the shipowner's own negligence, and not on the negligence of the loading stevedore, and in these circumstances, any risk of loss arising from inability to sue the foreign stevedore should be borne, not by the injured longshoreman, but by the shipowner who contracted with the foreign stevedore.

(ii) The vessel's ability to ensure safety.

Respondent next argues that the *Turner* decision should be rejected because, contrary to the assumption of the *Turner* Court, a shipowner may not always have the ability to choose a reliable foreign stevedore or the ability to supervise its

work. Respondent asserts, even though there is absolutely no factual evidence in the record to support the assertion, that in many countries shipowners have to use stevedores who are assigned to them, and that they have no right to intrude in the work of these stevedores. If one were to believe what respondent is saying, the poor shipowner is simply at the mercy of the foreign stevedore, without any ability to control how cargo is being loaded aboard its ship, *see* Respondent's Brief, pages 21-22.

One wonders if this respondent, or any shipowner, would claim that it is so helpless in its dealings with foreign loading stevedores if what was at issue was not possible injury to an unloading longshoreman but damage to the ship's cargo or to the ship itself by the loading stevedore. Would this respondent, or any shipowner, stand idly by if the longshoremen loading cargo aboard its ship were damaging the cargo, or breaking or damaging the ship or its equipment, or loading cargo in the wrong place on the ship, or in any other manner failing to perform their work properly? And at what port, even in the countries listed in respondent's brief, would the local authorities insist that a shipowner accept a stevedore the ship believed to be incompetent? And would any shipowner continue to go to a port where his only choice was to accept the work of an incompetent stevedore? Contrary to respondent's assertion, the ship always has a choice, and always has the ability to control the activities of those who come aboard the ship, and one can be sure that this is true even in those ports where the government assigns the stevedore.

Respondent also makes the unsupported assertion that crew members of a ship are not and do not purport to be experts in cargo handling or stowage, *see* Respondent's Brief, page 22. One should try telling this to a ship's Captain or

Chief Mate. While it may be true that longshoreman are more expert than members of a ship's crew in the performing the physical work of loading cargo, the same is not true when it comes to methods of handling cargo or the proper stowage of cargo. When it comes to methods of handling cargo or the proper stowage of cargo, the officers of a ship, in the person of the ship's Captain and Chief Mate, are at least as expert, if not more expert, than stevedoring personnel. Indeed, they have to be, for it is the Captain and the Chief Mate, not the loading stevedore, who are responsible for the safety of the ship and the safe delivery of its cargo. For this reason, no Captain or Chief Mate will take a ship to sea unless and until they are satisfied that the cargo they are carrying is properly and safely stowed. Respondent's assertion that the ship's crew is not expert in the handling and stowage of cargo, which is made without any supporting testimony or authority, is simply not true and is a statement which would be promptly rejected by any ship's Captain or Chief Mate.

c. Safety concerns.

Finally, respondent attacks the *Turner* decision on the grounds that its holding that a shipowner is responsible for dangerous conditions existing in a cargo stow would not encourage vessel safety. Instead, respondent asserts that the *Turner* holding defeats vessel safety because, according to respondent, most cargo accidents are caused by the discharging stevedore's negligence, *see* respondent's brief, page 24. This argument is without merit for several reasons.

First, respondent's assertion that a review of the reported cases dealing with cargo accidents reveals that negligence of the stevedore employer was the primary if not sole cause of the accident, *see* Respondent's Brief, at page 23, is without any statistical or other support, and is meaningless because it

doesn't take into consideration cases which are unreported or may have been settled (and, inevitably, it is only the doubtful or difficult cases that are tried). Secondly, under the *Scindia* duty, the shipowner's obligation would be to provide a ship whose cargo was in such condition that it could be discharged by an expert and experienced stevedore with reasonable safety. Therefore, if an accident is caused "solely" by the negligence of the stevedore, then the ship is not liable under *Turner* or any other decision. Third, as to cases where, according to respondent, even though the shipowner is at fault to some degree, the employer stevedore is "primarily" at fault, such "primary" fault simply does not and should not excuse the shipowner from liability for its own negligence, *see Edmunds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Since a shipowner will not be held liable to an injured longshoreman unless its negligence is found to have been a proximate cause of the accident, judgments as to "primary" and "secondary" negligence are irrelevant to an injured longshoreman who would not have been injured in the absence of the negligence of the ship.

3. In *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), the Fifth Circuit held that the *Scindia* duty of care, including the *Scindia* duty of inspection, extended to dangerous conditions existing in a cargo stow.

Respondent devotes a considerable portion of its brief to developing an intricate interpretation of the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), which would permit it to be distinguished from the instant case. This effort fails, as *Woods*, like *Turner*, is on all fours with the position here being urged by petitioner.

Notwithstanding respondent's complex analysis of the Fifth Circuit cases which led to the *Woods* decision, the best evidence as to what the Fifth Circuit meant in *Woods* is what it said, and what it said is quite clear.

At the time the Fifth Circuit decided *Woods*, the Third Circuit already had decided *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), on which the decision below in the instant case was based. The shipowner, in *Woods*, urged the Fifth Circuit to follow *Derr*, an invitation which the Fifth Circuit declined, stating, 873 F.2d at 848:

> . . . the defendants thus urge us to follow *Derr*'s lead and hold that a vessel cannot be held liable for injuries resulting from the negligence of an independent stevedore.
>
> Our court, however, has already visited this question and reached the opposite result.

Thus, no attempt by respondent at analyzing *Woods* and its predecessor Fifth Circuit cases can alter the fact that the Fifth Circuit, in *Woods*, clearly intended to and did reject *Derr*. Moreover, the Fifth Circuit, in *Woods*, went much further than simply rejecting *Derr*; it went on to specifically adopt the duty which petitioner is urging here, stating, 873 F.2d at 850:

> As noted, *supra*, it is the law in this circuit that, under the first *Scindia* duty, a vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety. The defendants may be found liable "for damages arising from a dangerous stow *[in]*

situations where the [defendants] knew or should have known of the dangerous condition." (Emphasis supplied)

Thus, as the foregoing quoted language indicates, and contrary to the assertions in Respondent's Brief, at pages 26 and 35, the Fifth Circuit, in *Woods*, did hold that a shipowner would be charged with knowledge of dangerous conditions in a cargo stow of which it knew or had reason to know, precisely the duty being urged here.

4. The right of a stevedore employer to recoup its compensation lien from a longshoreman's damage recovery does not reduce the employer's incentive to initiate and enforce safe work practices.

Respondent advances the argument that a shipowner should not be held liable for dangerous conditions in a cargo stow because, if the ship is found liable, the stevedore employer will recover its compensation payments even though the stevedore's negligence may have contributed to the happening of the accident, and, therefore, the stevedore will have no incentive to initiate and enforce safe work practices, see Respondent's Brief, at pages 25-26. Aside from the fact that a similar argument already has been rejected by this Court, *see Edmunds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), in the context of accidents resulting from dangerous conditions in a cargo stow, this argument is both unrealistic and illogical.

If a longshoreman is injured in the course of cargo operations, his stevedore employer has an immediate and absolute obligation to pay him workmen's compensation benefits. However, before an injury occurs, neither the longshoreman nor his stevedore employer know that an

accident is going to happen. Consequently, neither the longshoreman nor his stevedore employer have any way of knowing in advance whether any particular accident will give rise to a suit against a ship, whether any recovery will be made in that suit, or how much that recovery will be. As a result, the ability of an employer to recoup its compensation lien in any particular case will always be doubtful and in the future, while the employer's obligation to pay compensation benefits will be immediate and certain. Given this immediate and certain obligation to pay compensation benefits, no employer is going to reduce or limit its efforts to prevent accidents because there is a possibility that, at some time in the future, those payments may be recouped. Imposing liability on shipowners for dangerous conditions in cargo stows will not reduce the incentive on stevedore employers to implement safety programs, but not holding shipowners responsible for dangerous conditions in cargo stows certainly will eliminate any and all incentive on the shipowner to do its part in eliminating dangerous conditions from cargo stows.

5. The fact that a dangerous condition in a cargo stow is "open and obvious," or capable of being discovered by the unloading stevedore, does not relieve the shipowner from liability if the condition of the cargo is such that it can not be discharged with reasonable safety.

While not directly involved under the facts of the instant case, both respondent and *amicus* AIMS argue that a shipowner should not be liable for a dangerous condition in a cargo stow if that condition is "open and obvious" or capable of being discovered by the unloading stevedore, *see*

Respondent's Brief, pages 24, 47.[6] However, the argument that the vessel should not be liable for "open and obvious" conditions was considered and rejected by this Court in *Scindia*, *see* 451 U.S. at 167-168, and since *Scindia* was decided, it has been rejected by both the Fifth and Ninth Circuits in cargo stowage cases, *see Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), and *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442, 1446 (9th Cir. 1993).

Whether a given dangerous condition in a cargo stow is one which is capable of being discovered by the unloading stevedore is neither a separate legal nor a separate factual issue; rather, it is part of the broader factual issue encompassed within the ship's *Scindia* duty to warn the stevedore of conditions which "would not be obvious to or anticipated by him [*i.e., the unloading stevedore] if reasonably competent in the performance of his work,*" Scindia, supra, 451 U.S. at 167.

Under *Scindia*, the duty to warn and the duty to provide a ship which is in such condition that the stevedore will be able to carry on its cargo operations with reasonable safety are part of the ship's broader duty of "reasonable care under the circumstances," *see* 451 U.S. at 166-167. The ability of the stevedore to discover and avoid or remedy any particular dangerous condition is just one of the "circumstances" which the fact finder must consider in determining whether that duty

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[6]Contrary to the assertion at page 46 of Respondent's Brief, the district court did not find that the presence of the plastic was "open and obvious" to petitioner, *see* discussion at pages 39-40 of Petitioner's Brief, nor was there any evidence that petitioner's fellow workers saw or were able to see the plastic *before* the accident, *see* discussion at page 40, f.n 18, of Petitioner's Brief.

has been breached. It certainly is not an issue which can or should be determined on a motion for summary judgment.

In this context, the duty to warn can not really be separated from the duty to provide a safe ship. If a dangerous condition is concealed, *i.e.*, not "open and obvious," then the shipowner who knows or has reason to know of the condition has a duty to give warning of it. However, if the condition is "open and obvious," then there is no need to give separate warning of it because the fact that it is "open and obvious" itself constitutes the warning. However, *depending on the circumstances, whether* any particular condition is sufficiently apparent to be considered "open and obvious," may itself be a factual issue which can not be determined on a motion for summary judgment.

In addition, again depending on the circumstances, some dangerous conditions aboard a ship, be it a condition of the cargo or a condition of the ship or its equipment, if obvious, may be easily avoidable by the unloading longshoreman, and, in such circumstances, the ship would not be considered unsafe, *see Kirsch v. Plovidba*, 971 F.2d 1026, 1030 (3rd Cir. 1992); *Morris v. Compagnie Maritime des Chargeurs Reunis*, 832 F.2d 67, 70-71 (5th Cir. 1987). Other dangerous conditions, while obvious may not be avoidable, in which case the vessel would be liable even though the stevedore or the individual longshoreman was aware of the condition, *see McCarthy v. Silver Lines, Ltd.*, 661 F.2d 298, 299 (3rd Cir. 1981). Between these two extremes lie those situations in which the stevedore, even if aware of the condition, can not be reasonably expected to avoid the danger, in which case the vessel would remain liable for its negligence in providing a ship on which the cargo operations could not be performed with reasonable safety, *see Kirsch v. Plovidba, supra*, 971 F.2d at 1030-1031. In such circumstances, whether a

particular hazardous condition, be it a condition of the cargo or a condition of the ship or its equipment, is one which the stevedore may be reasonably expected to avoid, will be a "fact-intensive" question which can not be resolved on a motion for summary judgment, *Ibid.* at 1030.

The appropriate way to handle the issue of whether a given condition is one which the shipowner was entitled to rely on the unloading stevedore to discover and avoid is to treat it, not as part of the plaintiff longshoreman's case, but as a defense on which the shipowner, as the party urging the affirmative of the proposition, has the burden of proof, *see* United States v. R. Enterprises, 498 U.S. 292, 305 (1991) (Separate Opinion of Mr. Justice Stevens); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 589 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979). It is not an issue which the court can or should resolve on motion for summary judgment.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in petitioner's initial brief, it is respectfully submitted that the decisions below should be reversed and the case remanded for trial on the merits.

Respectfully submitted,

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